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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Power Act preempts state regulatory water rights laws otherwise applicable to hydropower projects licensed by the Federal Energy Regulatory Commission, or instead whether section 27 of the Act—which subjects such projects to state laws relating to the "control, appropriation, use, or distribution" of water—precludes such preemption.

PARTIES

The petitioner is the State of California, acting on behalf of the State Water Resources Control Board.

The respondents are the Federal Energy Regulatory Commission and the Rock Creek Limited Partnership.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Ninth Circuit (App. 1-13) is reported at 877 F.2d 743. The Order in Response to Request for Declaratory Order and Providing for Hearing, Federal Energy Regulatory Commission (App. 14-22), is reported at 38 FERC ¶ 61,240 (March 1987). The Order Denying Rehearing, Federal Energy Regulatory Commission (App. 23-36), is reported at 41 FERC ¶ 61,198 (November 1987).

JURISDICTION

The decision of the U.S. Court of Appeals for the Ninth Circuit was filed and entered on June 6, 1989. No petition for

rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

Section 27, Federal Power Act:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.).

STATEMENT OF THE CASE

1. Nature of the Controversy

The Rock Creek Limited Partnership ("partnership") operates a hydropower project on Rock Creek, a tributary of the South Fork of the American River near Placerville, California. App. 2, 14. The project diverts water from a dam located on Rock Creek to a power plant for generation of hydroelectric power; the water is returned to the South Fork of the American River about one mile below the original diversion point. App. 2-3, 14. The project diverts some water for the project and allows the remainder to flow in its natural course in Rock Creek. The minimum amount of water flow that must be left in Rock Creek is denominated the "flow rate."

In June 1982, the partnership applied to the Federal Energy Regulatory Commission ("FERC") for a license to build and operate the Rock Creek project. App. 3, 14. In April 1983, FERC issued the license. *Id.* In accordance with the partnership's recommendations, the license established interim flow rates of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April. *Id.* The license requires the partnership, in conjunction with the California Department of Fish and Game ("CDFG"), to conduct further instream studies to enable FERC to establish permanent flow rates for the project. App. 3, 15.

In May 1980, the partnership applied to the State Water Resources Control Board ("State Board") for permits to appropriate water for the project, and in June 1982 filed an amended application. App. 3, 16. After lengthy hearings, the State Board in February 1984 issued Decision 1596, approving issuance of the permits. *Id.* The State Board, although adopting the interim flow rates recommended by the partnership, found that the partnership's instream flow study was "deficient." Decision 1596, State Water Resources Control Board, at 8-9 (EOR 37). Accordingly, the State Board required the partnership, in conjunction with CDFG, to conduct a new instream study to enable the Board to establish permanent flow rates for the project. App. 3, 16. The State Board reserved jurisdiction to establish permanent flow rates after the partnership's instream study was completed. *Id.* The State Board found that minimum flows were necessary in order to protect an important trout resource in the Rock Creek-American River system. *Id.*

After completion of the new instream study, the State Board conducted a hearing to establish permanent flow rates for the project. Based on its findings, the State Board on March 19, 1987, established permanent flow rates of 60 cfs from March through June and 30 cfs from July through February. App. 4, 17. The State Board in large part adopted CDFG's recommended flow rates and rejected the partnership's recommended rates. The State Board found that CDFG's recommended rates would adequately protect the trout resource in the Rock Creek-American River system, and that the partnership's recommended rates would not. *Id.*

2. Proceedings Below

In July 1986, during the pendency of the State Board hearing to establish permanent flow rates, the partnership petitioned FERC for an order declaring that FERC has exclusive jurisdiction to establish flow rates for the project, and that the partnership need not comply with the State Board's flow rates. App. 4, 17. On March 11, 1987, FERC issued an order declaring that "the establishment of minimum flows is a matter beyond the reach of state regulation;" that the State Board "has no authority to set minimum flows for the project that conflict with those contained

in the license;" and that the project "must comply with the flow requirements . . . of its license until otherwise ordered by the Commission, irrespective of any action taken by" the State Board. App. 17-18.

On April 10, 1987, the State of California, on behalf of the State Board, filed with FERC a motion for intervention and request for rehearing. App. 4, 24. California's rehearing request argued that the State Board has water rights authority to establish flow rates under section 27 of the Federal Power Act. *Id.* FERC granted the intervention motion but denied the rehearing request. App. 4, 36. In denying the rehearing request, FERC declared that "the establishment of minimum flows for fishery protection or other purposes at licensed projects is a matter beyond the reach of state regulation and is within the Commission's exclusive jurisdiction." App. 23. Under 16 U.S.C. § 825*l*, California filed a petition in the U.S. Court of Appeals for the Ninth Circuit for review of FERC's declaratory order and order denying rehearing. App. 4.

On June 6, 1989, the Ninth Circuit issued an opinion affirming FERC's declaratory order and order denying rehearing. App. 1-13. The court held that the Federal Power Act preempts state regulatory water rights laws applicable to FERC-licensed hydropower projects. *Id.* The court concluded that FERC has exclusive jurisdiction to establish flow rates for the Rock Creek project, and that the partnership need not comply with the flow rates mandated by the State Board. *Id.* The court stated that its preemption analysis was supported by this Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), and also by FERC's "comprehensive planning authority" over hydropower projects under the Federal Power Act. App. 7-12. The court rejected California's argument that section 27 authorizes state water rights regulation of hydropower projects, stating that section 27 merely protects private "proprietary rights." App. 11. Quoting from this Court's decision in *First Iowa*, the Ninth Circuit stated that:

> " 'The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights. . . .*' " App. 11, quoting from 328 U.S. at 175-176 (emphasis added in Ninth Circuit opinion).

The Ninth Circuit concluded that:

> "This reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in the section." App. 11.

Therefore, the Ninth Circuit held that section 27 does not authorize state regulation of hydropower water uses, including flow rates.

ARGUMENT

INTRODUCTION

This case raises a significant national question that this Court has never directly decided, and concerning which this Court's most relevant decisions are in conflict. The question is whether the Federal Power Act (FPA) preempts state regulatory water laws applicable to hydropower projects licensed by the Federal Energy Regulatory Commission (FERC), or instead whether section 27 of the FPA precludes such preemption. Section 27 provides that federally-licensed hydropower projects must comply with state laws relating to "control, appropriation, use, or distribution" of water.

In petitioner's view, this Court should grant the petition and review this question for four reasons. First, this Court's most relevant decisions are in conflict with respect to the question. In *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), this Court stated, in dictum, that section 27 protects only private "proprietary rights" and does not authorize state regulation of hydropower water uses. Section 27 contains virtually identical language to section 8 of the Reclamation Act of 1902, and indeed was modeled after the latter provision. *In California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 of the 1902 Act authorizes state *regulation* of

federal water uses and is *not* limited to "proprietary rights." In short, *California*, in construing section 8, rejected the same "proprietary rights" argument that *First Iowa* upheld in construing section 27. Since section 27 was modeled after section 8, there is no basis for construing these provisions differently. This Court should grant review to resolve the conflict between its decisions in *California* and *First Iowa*.

Second, the Ninth Circuit decision, in holding that the FPA preempts state water laws, misconceives the broad language and policy of section 27. In enacting section 27, Congress meant to preserve the states' traditional water rights authority over hydropower projects. Congress has traditionally deferred to state water laws, and Congress continued this traditional policy in enacting section 27. In exercising their water rights authority, the states make important policy judgments concerning allocation of water among competing public and private needs, allocations that vitally affect the states' economic and environmental interests.

Third, the Ninth Circuit decision precludes uniform state regulation of water rights in the same river, thus resulting in potentially inconsistent regulation of such rights. In effect, the decision creates separate bodies of federal law and state law in the same river, resulting in confusion and uncertainty.

Fourth, there is no actual conflict between state and federal flow requirements in this case, because the state requirements are more stringent than the FERC requirements. The project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements as well.

In summary, this case presents a significant and unresolved national question concerning the scope of state water rights authority over federally-licensed projects, a question to which this Court's decisions provide conflicting answers. This Court should grant the petition to resolve the conflict and reaffirm the states' traditional water rights authority, as such authority was recognized by Congress in enacting the FPA.[1]

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[1] The preemption issue raised in this case has not previously arisen, at least in California, because hydropower projects have consistently complied with state water rights laws rather than relied on the argument that the FPA preempts such laws. According to the State Board's information, 492 non-federal hydropower projects in California have acquired or have applied for water rights under California law, and, again according to the State Board's information, no hydropower project has diverted water without acquiring or at least claiming a water right under California law. The Ninth Circuit decision, in holding that state water laws are preempted, effectively changes the *status quo* by allowing hydropower projects to bypass state water rights laws with which they have consistently complied.

The preemption issue, although somewhat dormant for several years beause of limited hydropower development, has gained immediacy since 1978, when Congress enacted the Public Utilities Regulatory Policies Act (PURPA), 92 Stat. 3117 (1978), codified as amended, 16 U.S.C. §§ 15. 16, 30, 42, 42. PURPA has caused a dramatic increase in applications for FERC licenses by creating substantial financial incentives for hydropower development. M. Whittaker, *Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers and Responsibilities*, 10 HARV. ENV. L. REV. 135, 138-141 (1986). For example, only 47 pre-PURPA applications for FERC permits and licenses were filed in 1977, but 1,752 post-PURPA applications were filed in 1981. *Id.* at 140. As the number of applications for FERC licenses has greatly increased, the potential conflict between FERC regulation and state water rights regulation has also increased.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN ITS DECISIONS IN *CALIFORNIA* AND *FIRST IOWA*

A. Conflict Between *California* and *First Iowa*

Section 27 of the FPA provides that hydropower projects licensed by FERC are subject to state laws relating to the "*control, appropriation, use, or distribution* of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1982 ed.) (emphasis added). Section 27 was patterned after section 8 of the Reclamation Act of 1902, which provides that federal reclamation projects authorized under that Act are subject to state laws relating to "*control, appropriation, use, or distribution* of water used in irrigation, or any vested right acquired thereunder." 32 Stat. 390 (1902), 43 U.S.C. §§ 372, 383 (1982 ed.)

(emphasis added.) The legislative history of section 27 indicates that the provision was directly modeled after section 8.[2] Indeed, the Ninth Circuit below acknowledged that sections 8 and 27 contain "virtually identical" language and that section 8 "apparently served as a drafting model for section 27." App. 9, 10.

In *California v. United States*, 438 U.S. 645 (1978), this Court held that section 8 of the 1902 Reclamation Act requires federal agencies to comply with state water rights laws to the extent that state laws are not inconsistent with "clear congressional directives." 438 U.S. 645, & 672 n. 25. In that case, the State Board issued permits authorizing the Secretary of the Interior to appropriate water for the federal New Melones Dam in California. The permits contained several major conditions, some of which required water releases for protection of downstream fish resources. This Court, reversing the Ninth Circuit, upheld the State Board's right to impose the conditions. The Court held that section 8 requires the Secretary both to acquire water rights under state law and to comply with conditions attached to the rights. *Id.* at 675. The Court noted that Congress has traditionally deferred to state water rights laws, stating that:

> "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the *consistent thread of purposeful and continued deference to state water law by Congress.*" *Id.* at 653 (emphasis added).

The Court specifically rejected the United States' argument that section 8 is limited to "proprietary rights." *Id.* at 672-674, & n. 24. The Court stated that the Secretary must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and must comply with state law in providing "distribution to individual landowners" once the water is released

[2] For example, the author of section 27 stated during the congressional debates that:

> "I took this language of section 14 [the predecessor of section 27] from section 8 of the reclamation act and inserted it in the bill." 51 Cong. Rec. 14067 (1914) (remarks of Rep. Taylor).

from the dam. *Id.* at 665, 667. The Court stated that "legal confusion . . . would arise if federal water law and state water law reigned side by side in the same locality." *Id.* at 668-669.[3]

Since *California* holds that section 8 requires the Secretary to comply with state water laws in operating federal reclamation projects, and since section 27 of the FPA was modeled after section 8, section 27 similarly requires hydropower projects licensed under the FPA to comply with state water laws. Moreover, since section 8 requires the Secretary to comply with conditions attached to state water rights permits, section 27 requires hydropower projects also to comply with conditions attached to state water rights permits. In short, section 27 imposes the same obligations on hydropower projects that section 8 imposes on federal reclamation projects. This construction is the clear import of *California*.

The Ninth Circuit disagreed, relying on dictum in *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946), which was decided thirty-two years before *California*. App. 10. In *First Iowa*, a hydropower project applied to FERC[4] for a license to build and operate a project on a river in Iowa. FERC denied the license on grounds that the project had failed to acquire a use permit under Iowa law. The denial was based on section 9(b) of the FPA, which requires hydropower projects to submit "satisfactory evidence" of compliance with state law as a condition to acquiring a FERC license. 16 U.S.C. § 802(b). This Court overturned FERC's order, stating that section 9(b) is an "informational" provision only. 328 U.S. at 169, 177. According to the Court, section 9(b) merely requires hydropower projects to submit "evidence" of steps taken to

[3] On remand, the Ninth Circuit, in a decision authored by then-Judge Kennedy, upheld all conditions imposed by the State Board on the New Melones Project, concluding that none were inconsistent with "clear congressional directives." *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

[4] The application was to FERC's predecessor, the Federal Power Commission. For simplicity, the Federal Power Commission will be referred to as FERC.

comply with state law prior to applying for a FERC license, but does not require projects actually to acquire a state permit as a "condition precedent or administrative remedy that must be exhausted before securing a federal license." *Id.* at 170. Otherwise, the Court stated, hydropower development would be subject to a "dual system of control" that would be "unworkable." *Id.* at 164, 168.

The *First Iowa* Court went beyond its immediate holdings—which was limited to the "informational" effect of section 9(b) in proceedings before FERC—to comment on the effect of section 27. The Court stated that:

> "Section 27 expressly 'saves' certain state laws relating to *property rights* as to the use of water, so that these are not superseded by the terms of the Federal Power Act. . . . [¶] The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such *proprietary rights*." *Id.* at 175-176 (emphasis added).

Thus, the *First Iowa* dictum states that section 27 is limited to "proprietary" rights and does not authorize state *regulation* of hydropower water uses. The Ninth Circuit relied on this dictum in construing section 27 here. App. 11.

The *First Iowa* Court—in stating that section 27 is limited to "proprietary rights"—expressly followed the precedent that, in the Court's view, had been established by section 8 of the 1902 Reclamation Act. 328 U.S. at 176 n. 20. The *First Iowa* Court noted that section 27 is "similar" to section 8 in that both require compliance with state laws relating to "control, appropriation, use, or distribution" of water. *Id.* The Court then stated that:

> "The use, in § 27 of the Federal Power Act, of language having a limited meaning in relation to *proprietary rights* under the reclamation law and in public lands, *carries that established meaning of the language [of section 8] into the Federal Power Act* in the absence of anything in the Act calling for a different interpretation of the language." *Id.* (emphasis added).

Thus, the *First Iowa* Court stated that section 27 "carries" the meaning of section 8 "into" the FPA, and that—since section 8 is limited to "proprietary rights"—section 27 is similarly limited. In short, the *First Iowa* Court—unlike the Ninth Circuit below—took the view that section 27 has the *same* meaning as section 8, although the Court ascribed to section 8 a different meaning than in its more recent decision in *California*.

The *First Iowa* view that section 8—and hence section 27—is limited to "proprietary rights" was consistent with this Court's contemporaneous interpretation of section 8 in the 1950's and 1960's. In several contemporaneous decisions, this Court stated in dicta that section 8 is limited to "proprietary rights" and therefore does not authorize state regulation of federal water uses under the 1902 Reclamation Act. *Ivanhoe Irrigation Dist. v. MacCracken*, 357 U.S. 275, 292 (1958); *City of Fresno v. California*, 372 U.S. 627, 630 (1963). In *Ivanhoe*, the Court stated that section 8 does not "compel the United States to deliver water on conditions imposed by the State." 357 U.S. at 292. In *City of Fresno*, the Court stated that section 8 does not prevent the United States from seizing private water rights, and simply "leaves to state law the definition of property interests . . . for which compensation must be paid" when the United States seizes such rights. 372 U.S. at 630. Thus, in *Ivanhoe* and *City of Fresno*, this Court adopted the view—consistently with its earlier dictum in *First Iowa*—that section 8 is limited to "proprietary rights" and does not authorize state regulation of water use.

In *California v. United States*, however, this Court expressly "disavow[ed]" the earlier dicta in *Ivanhoe* and *City of Fresno* that section 8 is limited to "proprietary rights," and expressly held that the provision authorizes state regulation of water uses. 438 U.S. at 672-674, & n. 24. In disavowing the *Ivanhoe* and *City of Fresno* dicta, the *California* Court stated that section 8 "does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the 'control, appropriation, use, or distribution of water.' " 438 U.S. at 675. Referring to the United States' "proprietary rights" argument, the

Court stated that "[t]he Government's interpretation would trivialize the broad language and purpose of § 8." *Id.* at 675.

Since *California* disavowed the dicta in *Ivanhoe* and *City of Fresno* restricting the scope of section 8, the *First Iowa* dictum restricting the scope of section 27 is no longer valid. That is, since *California* held that section 8 authorizes state regulation of water use and is not limited to "proprietary rights," and since *First Iowa* stated that section 27 "carries" the meaning of section 8 "into" the FPA, *California* and *First Iowa*, read conjunctively, stand for the view that section 27 also authorizes state regulation of water use and is not limited to "proprietary rights." In short, *California* rejected the premise on which *First Iowa*'s interpretation of section 27 was based.

B. Ninth Circuit Analysis

In a brief and unembellished passage, the Ninth Circuit decision stated that *California* and *First Iowa* can be reconciled because they "address two different and entirely separate water use programs." App. 12. The Ninth Circuit decision does not spell out the differences between these programs, or indicate why any such differences support incongruent interpretations of sections 8 and 27. Indeed, the decision fails to mention that *First Iowa* itself construed these sections congruently by stating that section 27 "carries that established meaning of the language [of section 8] into the Federal Power Act." 328 U.S. at 177 n. 20.

To be sure, the Federal Power Act and the Reclamation Act establish different programs in that FERC exercises a regulatory function and the Secretary of the Interior—who administers the federal reclamation program—primarily exercises an operational function. On the other hand, the Federal Power Act and Reclamation Act commonly provide for federal *development* of water for specified economic purposes; commonly establish federal agencies that are responsible for providing such development; and commonly utilize a resource—water—that the states have traditionally regulated and controlled. Moreover, Congress has narrowed any differences between the programs by providing for extensive regulation of federal reclamation projects. See, *e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.*; Reclamation Project Act of 1939, 43 U.S.C. § 485h; Reclamation

Reform Act of 1982, 96 Stat. 1263; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c. The Secretary of the Interior has narrowed the differences further by preparing feasibility and engineering reports that provide *de facto* regulation of reclamation projects. See, *e.g.*, H.R. Doc. No. 453, 87th Cong., 2d Sess. (1962) (feasibility report for New Melones Project). For these reasons, the similarities of the Reclamation Act and Federal Power Act are stronger than their differences, and there is no basis for construing the savings provisions in sections 8 and 27 differently.

By construing the savings provisions differently, the Ninth Circuit decision results in inconsistent water rights regulation in the reclamation and hydropower contexts. Under the decision, state water rights laws apply to federal reclamation projects but not to private hydropower projects. For example, California law applies to a federal reclamation project in the Stanislaus River—as this Court held in *California*—but, under the Ninth Circuit's analysis, not to a private hydropower project located in the same river. This result creates the "legal confusion" that, as this Court noted in *California* "would arise if federal water law and state water law reigned side by side in the same locality." 438 U.S. at 668-669.

Indeed, there is a stronger basis for applying state laws in the hydropower context involved here than in the reclamation context involved in *California*. Federal reclamation projects are built and operated by the federal government, and are authorized and funded by Congress. Private hydropower projects, on the other hand, are built and operated for profit purposes by private entities, and are *not* authorized or funded by Congress. Moreover, federal reclamation projects serve important national and regional purposes, and, conversely, private hydropower projects serve more local purposes. As the Ninth Circuit stated in a FERC case involving the navigation servitude:

> "[T]he position of a licensee [under the FPA] is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the national interest

on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power." *Public Utility Dist. No. 1 v. Seattle,* 382 F.2d 666, 669-670 (9th Cir. 1967).

If Congress defers to state laws applicable to federal projects that are authorized and funded by Congress and that serve important national purposes, *a fortiori,* Congress defers to state laws applicable to private hydropower projects that are not authorized or funded by Congress and that serve essentially local purposes.

C. Summary

To summarize, this Court in *California* held that section 8 authorizes state regulation of federal water uses, rejecting the argument that the provision is limited to "proprietary rights." More than thirty years earlier, this Court in *First Iowa* stated in dictum that section 27 is limited to "proprietary rights" and does not authorize state regulation of hydropower water uses. The *California* Court, in construing section 8, rejected the same "proprietary rights" argument that the *First Iowa* Court upheld in construing section 27. There is no basis for construing the provisions incongruently, because section 27 was modeled after section 8. Indeed, the *First Iowa* Court stated that section 27 should be read congruently with section 8, although this Court held a different view of section 8 at the time. In *California*, this Court flatly rejected its earlier view that section 8 is limited to "proprietary rights," thus rejecting the premise on which *First Iowa's* interpretation of section 27 was based. The time has come for this Court to complete the circle and hold—consistently with its recent decision in *California*—that section 27 authorizes state regulation of hydropower water uses and is not limited to "proprietary rights."[5]

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[5] In petitioner California's view, *First Iowa* can be reconciled with *California* and distinguished here. In *First Iowa*, the Court held only that section 9(b) does not require hydropower projects to acquire state water rights as a condition precedent to acquiring a FERC license. This case, on the other hand, raises the question whether section 27—as opposed to section 9(b)—requires hydropower projects to acquire state water rights prior to diverting water, rather than prior to acquiring a FERC license. Conceivably, section 9(b) can be interpreted—as in *First Iowa*—to hold that hydropower projects need not acquire state water rights as a condition precedent to acquiring a FERC license, even though section 27 should be interpreted—as here—to hold that such projects must acquire state water rights prior to diverting water. The Ninth Circuit did not accept this suggested distinction.

II. IN HOLDING THAT THE FEDERAL POWER ACT PREEMPTS STATE WATER LAWS, THE NINTH CIRCUIT DECISION MISCONSTRUES THE BROAD LANGUAGE AND PURPOSE OF SECTION 27, WHICH AUTHORIZES THE STATES TO EXERCISE TRADITIONAL WATER RIGHTS AUTHORITY OVER HYDROPOWER PROJECTS

A. Anti-Preemptive Effect of Section 27

Section 27 of the FPA is an anti-preemption provision, for it specifically limits the preemptive effect of the FPA. According to its terms, section 27 precludes preemption of state laws relating to the "control, appropriation, use, or distribution" of water. No exception is made for state laws applicable to hydropower projects. Indeed, the provision defines the obligations of hydropower projects under state law. Nothing in the provision precludes state "regulation" of water or limits its scope to "proprietary rights." State flow requirements are included in state laws relating to "control, appropriation, use, or distribution" of water. Therefore, on its face, section 27 requires hydropower projects to comply with state water rights laws, including state flow requirements.[6]

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[6] The Ninth Circuit stated that section 27 is "somewhat ambiguous" because the words "control, appropriation, use, or distribution" are used in relation to "water used in irrigation or for municipal or other uses, or any vested right therein." App. 9. According to the court, these qualifying words might support the view that section 27 "limit[s] state authority to the area of property rights involving water for irrigation, municipal use, and related activities." App. 8. Section 8 of the 1902 Reclamation Act, however, contains similar qualifying language, for the words "control, appropriation, use, or distribution" in section 8 are used in relation to "water used in irrigation, or any vested right acquired thereunder." In *California v. United States*, this Court rejected the

The legislative history of section 27 strengthens the conclusion that state water laws apply to federally-licensed hydropower projects. According to the legislative history, Congress intended to follow the precedent of section 8 of the 1902 Reclamation Act and preserve the states' traditional water rights authority over hydropower projects. 51 Cong. Rec. 13625, 13630, 13361, 14070, 14071 (1914) (remarks of Reps. Ferris, Mondell, Taylor, Raker and Seldomridge). For example, the author of section 27 stated that the provision is "substantially the same as section 8 of the reclamation law," and that hydropower projects "will have to come in on an equality with all other water users and acquire and use their water rights under our State water-rights laws. . . ." 51 Cong. Rec. 13631, 14071 (remarks of Rep. Taylor); see note 2, *supra*. Another proponent of section 27—who was the primary author of section 8 of the 1902 Reclamation Act—stated that:

> "The Federal Government can give no grant of right to build power plants on public lands in the Western States that will carry with it any right to divert a drop of water or to use a drop of water for the turning of any wheel or turbine. *That right, under the laws of the States, recognized by the Federal Constitution and the courts, must be secured from the people through the authorities they have provided in the States.*" 51 Cong. Rec. 13630 (1914) (remarks of Rep. Mondell) (emphasis added).

The legislative history also indicates that, in Congress' mind, the states "own" the water and the federal government owns the public lands; Congress wanted to develop a federal program that would make federal lands available for hydropower projects without diminishing state water rights authority over the projects. S. Rep. No. 66, 64th Cong., 1st Sess. 9 (1916); H.R. Rep. No. 16,

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argument that these qualifying words indicate that section 8 is limited to "proprietary rights." 438 U.S. at 675. Therefore, the same argument should be rejected in construing section 27.

In a post-*First Iowa* decision, this Court expressly rejected its view in *First Iowa* that the qualifying words in section 27 indicate that the provision does not apply to hydropower water uses. *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954).

64th Cong., 1st Sess. 14 (1916). For example, a Senate report stated that:

> "This bill distinctly recognizes the ownership and the right of control in the States of the use of the waters in the flowing streams of the States. . . . [¶] This bill . . . is not intended to trench upon the right of the State to the control of the water flowing in the streams within its borders. *It is framed upon the distinct theory that the State owns and controls the use of water flowing within the streams within its boundaries, and that the Federal Government owns and has the right to control and dispose of the public lands bordering and adjacent to such streams.* [¶] . . . Each must contribute its share. *The Federal Government must contribute the use of land, and the States must contribute the use of water. . . .*" S. Rep. No. 66, 64th Cong., 1st Sess. 4-5 (1916) (emphasis added).

The *First Iowa* Court cited—and indeed misconstrued—a small portion of the legislative history relevant to section 9(b), 328 U.S. at 174,[7] but did not cite the more extensive legislative history relevant to section 27, other than to note that section 27 follows the precedent of section 8 of the 1902 Reclamation Act. 328 U.S. at 176 n. 20.

Congress' traditional policy of deference to state water law further strengthens the conclusion that Congress deferred to state water law in enacting section 27. As this Court noted in *California*, Congress traditionally has followed a policy of "purposeful and continued deference to state water law." 438 U.S. at 653. Under the Desert Land Act of 1877, 19 Stat. 377, and other acts adopted earlier, Congress "severed" the water from the public

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[7] The *First Iowa* Court cited only Representative LaFollette's statement that section 9(b) preserved state "property rights" in water, inferring therefrom that section 9(b) is limited to state laws protecting *private* property rights. 328 U.S. at 174; 56 Cong. Rec. 9810 (1914) (remarks of Rep. LaFollette). In fact, LaFollette's statement was a reference to *state* proprietary interests under the equal footing doctrine, and this Court has held that such state proprietary interests include the right to *regulate* use of water. *California*, 438 U.S. at 654-655, 663; *Kansas v. Colorado*, 206 U.S. 46, 94-95 (1907).

domain lands, providing for state rather than federal regulation of water rights. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *California*, 438 U.S. at 657-658; *United States v. New Mexico*, 438 U.S. 696, 702 (1978). Under the equal footing doctrine, the states are deemed to possess sovereign ownership and control of all navigable waters within their borders, subject to the federal power to regulate and control navigation. *Shively v. Bowlby*, 152 U.S. 1, 14-15, 16, 49-50 (1894); *United States v. Oregon*, 295 U.S. 1, 14 (1935). Congress followed these severance and equal footing principles in authorizing state regulation of federal water uses under the 1902 Reclamation Act, *California*, 438 U.S. at 663-670, and followed the same principles in authorizing state regulation of hydropower projects under the FPA. Therefore, section 27 is in the mainstream of Congress' traditional policy in the field of water rights regulation, rather than a departure from its traditional policy.

B. FERC's "Comprehensive" Planning Authority

The Ninth Circuit held that FERC's "comprehensive planning authority" over hydropower projects supports the view that the FPA preempts state water laws. App. 7-8. This Court, however, has rejected the view that the "comprehensive" nature of a federal program, in itself, supports the view that federal law preempts state law. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 414-415 (1973); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983). In answering the preemption inquiry, the proper focus is on Congress' intent, not the "comprehensive" nature of its regulation. *Id.* Moreover, where Congress adopts an *anti-preemption* provision, such as section 27, Congress specifically manifests its intent and the "comprehensive" nature of its regulation is even less relevant. In cases involving an anti-preemption provision, it is improper to determine whether state law "conflicts" with federal law or its objectives, because Congress has directly answered the question by adopting the anti-preemption provision; the proper focus is on the meaning of the anti-preemption provision itself. *California Fed. Savings & Loan Ass'n v. Guerra*, ___ U.S. ___, 107 S.Ct. 683, 697 (1987) (Scalia, J., concurring); L. TRIBE, AMERICAN

CONSTITUTIONAL LAW, at 482 n. 8 (2d ed. 1988).[8] Since section 27 specifically limits the FPA's preemptive effect, the FPA does not preempt state water laws regardless of the "comprehensive" nature of its regulatory scheme.

Additionally, Congress presumptively does not intend to preempt state laws in an area traditionally regulated by the states. As this Court has stated:

> "When Congress legislates in a field *traditionally occupied* by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.' " *California v. ARC America Corp., et al.*, ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989), quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).

Since the states have traditionally regulated water rights, it is unlikely that Congress intended to displace traditional state water rights authority over hydropower projects. Nothing in the FPA reflects a "clear and manifest purpose" to preempt state water laws, and indeed section 27 specifically defers to state laws.

In other contexts, Congress has provided for concurrent state jurisdiction over activities regulated under federal law, particularly activities affecting use of water. For example, the Rivers and

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[8] According to Professor Tribe:

> "The governing statute may . . . restrict its own preemptive effect. . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law . . . 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path." TRIBE, AMERICAN CONSTITUTIONAL LAW, at 482; see also *id.* at 510-511 (emphasis in original).

Harbors Act of 1899 (RHA), 33 U.S.C. §§ 401, 403, authorizes the Army Corps of Engineers to exercise permit authority over activities affecting navigability of water. The Army Corps of Engineers' permit authority extends to diversions from navigable waters that are authorized under state water rights laws. *California v. Sierra Club*, 451 U.S. 287 (1981). In exercising its permit authority, the Army Corps of Engineers considers many of the same "public interest" factors that the states consider in exercising water rights authority over the diversions. 33 CFR § 320.4(a), 40 Fed. Reg. 31326-31327 (1975). Nonetheless, this Court has held that a person acquiring an Army Corps of Engineers permit must also acquire a state water right permit, and must fully comply with conditions attached to the state permit. *Cummings v. Chicago*, 188 U.S. 410, 431 (1903). As this Court has stated in another context, the issuance of the federal license is "simply acknowledgement that the activity does not violate federal law, and is not an exemption from state licensing or police power requirements." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). Similarly, a FERC license is simply an "acknowledgement" that the project does not violate federal law, not an exemption from state water rights laws.[9]

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[9] Congress has provided for concurrent state jurisdiction over other kinds of federally-licensed activities. See, *e.g., Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983) (state has right to economically regulate nuclear power facilities licensed by the Atomic Energy Commission); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 207-208 (1944) (state has right to apply licensing requirements to custom house brokers licensed under federal law); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 337 (1973) (state has right to apply licensing requirements to marine terminal facilities licensed under federal law); *Rice v. Rehner*, 463 U.S. 713 (1983) (state has right to apply licensing requirements to Indian traders on Indian reservations licensed under federal law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state may impose certification requirements to agricultural commodities certified under federal marketing orders); *Hillsborough County Florida v. Automated Medical Laboratories*, 471 U.S. 707 (1985) (state has right to apply operating requirements to blood plasma vendors licensed under federal law); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (state has right to regulate smoke emissions from vessels licensed under federal law); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (state conservation laws apply to fish traps authorized under permits issued by U.S. Forest Service).

In administering their water rights laws, the states make important policy judgments concerning public and private needs—municipal, agricultural, industrial and instream needs—that are dependent on the scarce water supply. In the arid West, the allocation of water among these competing needs determines in large measure the states' economic growth and environmental quality. Under the Ninth Circuit decision, FERC would be able to override the states' policy judgments by allocating disproportionate quantities of water *exclusively* for hydropower uses, thus limiting availability of water for other public and private needs that are vital to the state's economic or environmental interests. In effect, FERC would function as a super water rights agency, with ultimate authority to determine how much water is available for hydropower uses and competing uses. In enacting section 27, Congress intended that the states would retain their traditional water rights authority to make these policy judgments. The Ninth Circuit decision undermines this congressional purpose by diminishing state water rights authority. This Court should grant review to reaffirm Congress' policy of deference to state water law, as it did nine years ago in *California*.

III. THE NINTH CIRCUIT DECISION PRECLUDES UNIFORM STATE REGULATION OF WATER RIGHTS, RESULTING IN POTENTIALLY INCONSISTENT REGULATION OF RIGHTS IN THE SAME RIVER

The Ninth Circuit decision exempts private hydropower projects from state water laws that apply to all other water users in the same river. Indeed, the decision exempts hydropower projects from state laws that—after *California*—apply to federal water projects authorized by Congress itself. In effect, the decision creates two bodies of law in the same river: a body of FERC-created law applicable to private hydropower projects, and a body of state law applicable to all other users. In *California*, this Court commented unfavorably on the "legal confusion that would arise if federal water law and state water law reigned side by side in the

same locality." 438 U.S. at 699. The Ninth Circuit decision creates "legal confusion" by precluding uniform state regulation of water rights in individual stream systems.

By precluding uniform water rights regulation, the Ninth Circuit decision results in potentially inconsistent regulation of water rights in the same river. For example, suppose that a private hydropower project in a river is sandwiched between an upstream municipal diversion project and a downstream federal reclamation project. Clearly the upstream municipal project must comply with state water law. After *California*, the downstream federal project must also comply with state law. Under the Ninth Circuit decision, the hydropower project located between these projects need *not* comply with state law. Thus, the decision allows private hydropower projects to avoid state regulation that applies to all other users in the same river.

Because of the interdependency of water rights, the states cannot effectively administer their water rights systems if some users are subject to state law and others are not. For example, if the state establishes minimum flow requirements for all users in order to protect downstream fish resources, the state cannot effectively administer the flow requirements unless all users—including hydropower projects—are subject to the requirements; otherwise, the hydropower projects could capture for their own use the minimum flows that the state requires to bypass the other projects. Therefore, the Ninth Circuit decision, by exempting hydropower projects from state laws applicable to others, precludes states from effectively regulating *non-power* uses clearly within their jurisdiction. The decision makes it impossible for states to provide for coordinated management and control of water rights.

This Court has recognized that water rights are "highly interdependent," and that such interdependency supports the need for "comprehensive state systems for adjudication of water rights." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Because of interdependency of water rights, it is more important that hydropower projects are governed by a uniform *state* rule applicable to all users in the same river than by a uniform *national* rule applicable only to hydropower

projects. As this Court has stated, " 'it is essential that each and every owner along a given water course . . . must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.' " *California*, 438 U.S. at 678-679, quoting from S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951). In short, the interdependency of water rights supports the need for uniform state regulation of such rights. The Ninth Circuit decision precludes uniform state regulation by exempting hydropower projects from state laws applicable to other users.

Additionally, the Ninth Circuit decision results in inconsistent regulation of *hydropower* uses, for it preempts state laws as applied to power uses of *private* projects but not as applied to power uses of *federal* projects. Federal reclamation projects often store and release water for multiple purposes, including power purposes. Under section 8 of the 1902 Reclamation Act, state water laws apply to *all* purposes of federal reclamation projects, including power uses. *United States v. California*, 694 F.2d 1171, 1179-1180 (9th Cir. 1982) (on remand of *California v. United States*, state water laws held to apply to power uses of federal New Melones Project). The FPA does not preempt state laws applicable to power uses of federal projects because the FPA does not apply to such projects. See *Uncompahgre Valley Water Users Ass'n v. Federal Energy Regulatory Comm'n*, 785 F.2d 269 (10th Cir. 1986). Therefore, under the Ninth Circuit decision, state water laws apply to power uses of *federal* projects but not to power uses of *private* projects. There is no basis in law or policy for exempting private power projects from state laws that apply to federal power projects.

IV. CONTRARY TO THE NINTH CIRCUIT DECISION, THERE IS NO CONFLICT IN THIS CASE BETWEEN STATE AND FEDERAL REGULATION OF THE ROCK CREEK PROJECT

In petitioner California's view, section 27 authorizes the states to exercise water rights authority over hydropower projects licensed by FERC, and therefore authorizes the states to deny water rights permits for projects that are unable or unwilling to comply with state laws. In this case, however, California has not

exercised its authority to deny a water right permit for the project. Rather, California has granted a water right permit, thus authorizing the project to divert water under California law. This case is distinguishable from *First Iowa* on this ground because, in *First Iowa*, the Iowa statute effectively vetoed the project by prohibiting construction of the dam. *First Iowa*, 328 U.S. at 166-167.

Moreover, the state flow requirements in this case are not in conflict with the FERC flow requirements, because the state requirements are more stringent than the FERC requirements. The project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements. The project can meet its obligations under both federal and state requirements, and is not required to choose between them. Hence, there is no conflict between the state and federal flow requirements in this case.

The Ninth Circuit ruled otherwise, stating that the state requirements "would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project." App. 12. In fact, FERC conducted no hearing to determine the effect of the state flow requirements on the project. Hence, the record is devoid of any evidence concerning the effect of the state requirements on the project's economic feasibility. In effect, the Ninth Circuit held that the state conditions are facially void regardless of their effect. The Ninth Circuit decision cannot be reconciled with this Court's recent decision in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), which holds that, to the extent possible, facial preemption challenges to state environmental regulation should be rejected. 480 U.S. at 593.[10]

[10] The Ninth Circuit decision is inconsistent with *Granite Rock* in a more fundamental respect. In *Granite Rock*, this Court held that Congress' mining statutes—although preempting state "land use" regulation of mining activity on federal lands—do not preempt state "environmental" regulation of such activity. 480 U.S. at 587. According to the Court, state "land use" regulation "chooses particular uses for the land;" state "environmental" regulation, on the other hand, "does not mandate particular uses of land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* California's regulations in the instant case consist of "environmental" regulation rather than "land use" regulation, for California has granted a water right permit and has imposed minimum flow requirements to mitigate the project's harmful environmental effects on downstream fish resources. Thus, under *Granite Rock* California has the right to apply its flow requirements here. Indeed, California's position is stronger here than in *Granite Rock*, for the FPA contains a specific anti-preemption provision—section 27—and no similar anti-preemption provision was involved in *Granite Rock*.

CONCLUSION

For the foregoing reasons, it is requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 87-7538
Proj. No. 3189

State of California,
ex rel State Water Resources Board,
Petitioner,
v.
Federal Energy Regulatory Commission,
Respondent,

Rock Creek Limited Partnership,
Intervenor.

OPINION
Petition for Review of a Decision of the
Federal Energy Regulatory Commission

Argued and Submitted
December 16, 1988—San Francisco, California
Submission Withdrawn January 5, 1989
Resubmitted January 27, 1989

Filed June 6, 1989

Before: Procter Hug, Jr., Thomas Tang and
Robert Boochever, Circuit Judges.

Opinion by Judge Hug

COUNSEL

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OPINION

HUG, Circuit Judge:

The State of California petitions us to review the Federal Energy Regulatory Commission's decision finding exclusive federal control over the setting of hydroelectric power project water flow rates. After examining the preemption implications of the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a-828c (1982 & Supp. V 1987), we affirm the Commission's conclusion that the Act awards the federal government sole authority to set flow rates.

BACKGROUND

Rock Creek is a small tributary of the South Fork of the American River near Placerville, California. Rock Creek runs entirely within the state of California and lies on public lands administered by the U.S. Bureau of Land Management.

The Rock Creek Limited Partnership chose the creek as the site for a small hydroelectric power project. They proposed a project that will consist of a concrete diversion dam located about one mile upstream from Rock Creek's confluence with the American River. The dam will divert water through a tunnel into three penstocks, and then into a powerhouse equipped with three turbine generators having a total capacity of 3,000 kilowatts. After passing through the powerhouse, the water will empty into the American River about one mile down stream. The penstocks and powerhouse will be built on the site of an older powerhouse and

penstock complex. The project is expected to generate about 7,000 megawatt-hours of electricity annually. The Pacific Gas & Electric Company will purchase the project's power.

The dam will divert some of the water flow from Rock Creek into the power project and leave the remainder of the water to flow in its natural course in Rock Creek. The minimum amount of water flow that must be left in Rock Creek, denominated the "minimum flow rate," is the principal point at issue in this case.

In April, 1983, after submission of an application by the Partnership, the Federal Energy Regulatory Commission ("FERC") issued a license for the project's construction and operation. Article 37 of the license fixed an interim minimum flow rate of eleven cubic feet per second ("cfs") from May to September, and fifteen cfs from October through April. These flow rates would apply until the project's sponsors satisfied the provisions of Article 38, which requires the owners to conduct long-term minimum flow rate studies in conjunction with the California Department of Fish and Game ("DFG").

In February, 1984, the California State Water Resources Control Board ("WRCB") issued two permits to the project for the appropriation of Rock Creek's water. These permits incorporated the federal license's interim minimum flow figures and reserved jurisdiction to the WRCB to set permanent rates after completion of the long-term studies. The permits noted that Rock Creek serves as an important source of adult trout for the Rock Creek-American River system. California law in effect at the time the permits were issued charged the WRCB with subjecting appropriations "to such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest" the water affected by the permits. Cal. Water Code § 1257 (West 1971).[1]

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[1] California cites the Water Code at section 1257.5 for the proposition that the WRCB may impose streamflow requirements necessary to protect fish and wildlife. Cal. Water Code § 1257.5 (West Supp. 1989). California added this provision to its Code in 1985. The WRCB issued the Rock Creek permits in 1984. Section 1257.5, therefore, does not apply.

In July, 1986, the project's sponsors petitioned for a declaratory order stating that FERC had exclusive jurisdiction to establish permanent minimum flow rates. About eight months later, in March, 1987, FERC issued a declaratory order in which it held that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under section 10(a) of the Federal Power Act." 38 FERC ¶ 61,240 (1987) (footnote omitted). In addition to citing the FPA, the Commission relied on *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), for authority to preempt state regulation of flow rates.

A few days after FERC issued its declaratory order, the WRCB amended its permits in response to the DFG's completion of the fishery studies. On the DFG's recommendation and after a hearing in which the project's sponsors disputed the studies, the WRCB increased minimum flow rates to permanent levels of sixty cfs from March through June and thirty cfs from July through February. In the order amending the permits the WRCB stated that *First Iowa* did not support federal preemption of this issue and that the WRCB had "jurisdiction in this matter to regulate the Rock Creek project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by FERC." WRCB Order WR 87-2 (1987).

The State of California then filed with FERC a motion for intervention on behalf of the WRCB and requested a rehearing of the declaratory order. The rehearing petition raised as its sole argument the question of federal preemption under the FPA of flow rate setting powers. FERC granted the intervention motion but denied, in November, 1987, the rehearing request.

California filed a timely petition in this court in December, 1987, seeking review of the declaratory order and the order denying rehearing. It presents the issue of whether the FPA vests exclusive authority in FERC to set minimum flow requirements for hydroelectric power projects licensed under the Act.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 16 U.S.C. § 825*l*(b) to review decisions issued by the Commission. Our jurisdiction is limited to objections raised in the petitioner's application for rehearing before the Commission. 16 U.S.C. § 825*l*(b) (1982); *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988).

Our review of the decision at issue in this appeal is respectful but searching. Generally, we may reverse the Commission's orders only if we find them arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with law. 5 U.S.C. § 706(2)(A) (1982); *City of Centralia, Wash. v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986); *The Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985). California challenges, however, the Commission's determination of purely legal questions involving the construction of the FPA. Since this case involves only issues of statutory interpretation, the high degree of deference associated with the arbitrary and capricious standard, *see Nat'l Wildlife Fed'n v. Burford*, No. 87-4375, slip op. at 3272-73 (9th Cir. March 30, 1989), is considerably relaxed. While we accord deference to the construction of a statute by those charged with its administration, *Filiberti v. Merit Sys. Protection Bd.*, 804 F.2d 1504, 1508 (9th Cir. 1986); *City of Centralia*, 799 F.2d at 481, we keep in mind that the courts are the final authorities on issues of statutory construction, *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *Tulalip Tribes of Wash. v. FERC*, 732 F.2d 1451, 1454 (9th Cir. 1984). The justification for deference to an agency's interpretation of a statute decreases when the statutory construction requires consideration of broad concerns beyond the agency's expertise. *Grunfeder v. Heckler*, 748 F.2d 503, 505 (9th Cir. 1984) (en banc). The FERC decision in this case deals not with the technical aspects of the FPA but with general issues of preemption and the division of regulatory authority between state and federal governments. These subjects belong to the sphere of judicial rather than agency expertise.

ANALYSIS

California asserts that neither the terms of the FPA nor case law interpreting it authorize federal preemption of state laws dealing with the acquisition of water rights and the conditions attached to the exercise of those rights. California offers two main lines of argument. First, it claims that section 27 of the FPA, codified at 16 U.S.C. § 821 (1982), is an anti-preemption provision requiring projects licensed under the FPA to comply with state water rights and usage laws. Second, it argues that *First Iowa* is distinguishable and not on point. California relies heavily on the FPA's legislative history and on the Supreme Court's holdings in *California v. United States*, 438 U.S. 645 (1978), for these arguments.

Against California's contentions, FERC argues that the FPA vests comprehensive hydropower planning authority in the federal government genrally and in FERC specifically. It claims that this authority amounts to a clear grant of preemption. It also argues that *First Iowa* recognized and approved this preemption and that *California v. United States* is irrelevant to the issues at hand.

I. *Preemption*

Preemption analysis always starts with the presumption that Congress did not intend to displace state law. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). However, as the Court has stated:

> Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so prevasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominate that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it might reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947). "Even when Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law." *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 240 (1983). A state law conflicts with federal law when it is physically impossible to comply with both or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Our task is to examine the FPA to determine how Congress intended to divide authority between the states and the federal government over hydropower projects. We look to whether the WRCB's retention of jurisdiction over the flow rates conflicts with the FPA.

II. Statutory Interpretation

Before considering case law and legislative history, a court reviewing a statutory construction must turn to the statute itself. *Touche Ross and Co. v. Redington*, 442 U.S. 560, 568 (1979). Examining a statute's meaning entails looking at the statute as a whole, not at individual sections in a vacuum. *See Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1259 (1988); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 (1987).

Although not dispositive of the preemption issue, the statute read in its entirety strongly suggests that Congress intended the FPA to vest final authority for the regulation of hydroelectric power projects in federal hands. The following sections illustrate Congress' general intent to preempt the hydropower field to the exclusion of state controls: Section 4(e), 16 U.S.C. § 797(e) (Supp. V 1987) ("The Commission is authorized and empowered—To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, [and] powerhouses . . . for the development, transmission, and utilization of power . . . in any of the streams or other bodies of water which Congress has jurisdiction. . . . "); Section 10(a), 16 U.S.C. § 803(a)(1) (Supp. V. 1987) ("All licenses issued . . . shall be on the following conditions: That the project . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of

water-power development . . . [and] if necessary . . . to secure such plan the Commission shall have authority to require the modification of any project. . . ."); and Section 7(a), 16 U.S.C. § 800(a) (Supp. V. 1987) ("In issuing preliminary permits . . . or original licenses . . . the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region."). To execute this general planning power, Congress gave FERC specific powers under the FPA to issue preliminary permits (§§ 4(f) and 5, 16 U.S.C. §§ 797(f) and 798 (1982)); investigate power development resources (§ 4(g), 16 U.S.C. § 797(g) (1982)); mandate prompt construction schedules in the license's terms (§ 13, 16 U.S.C. § 806 (1982)); grant licenses for a limited term of fifty years (§ 6, 16 U.S.C. § 799 (1982)), after which the Commission may take over the project on behalf of the United States on payment of just compensation (§ 14(a), 16 U.S.C. § 807(a) (1982)); to control the precise terms of the license (§ 6, 16 U.S.C. § 799 (1982)); and to award powers of eminent domain to licensees (§ 21, 16 U.S.C. § 814 (1982)). The weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity.

The language of one FPA provision, however, forestalls reaching with certainty the conclusion that the FPA manifests a clear congressional intent to preempt state regulations in every aspect of the hydropower domain. Section 27, codified at 16 U.S.C. § 821 (1982), states that "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." The difficulty with section 27 arise from the fact that its language can support two conflicting readings. One reading would construe the section to limit state authority to the area of property rights involving water for irrigation, municipal use, and related activities. Under this reading, any aspect of operating a hydropower project not implicating these rights would fall under exclusive federal regulation. A second reading would construe the section much more broadly as an anti-preemption clause that

gives the states final authority over all issues connected to the control and use of water by a project licensed under the FPA. This interpretation would support the idea that the states, not the federal government, have the last word over matters such as minimum flow rates. Since the provision's plain meaning is somewhat ambiguous, resolution of the preemption issue requires a turn to sources outside the statute.

III. Case Law

California would resolve section 27's ambiguity by drawing on the section's legislative history and the Supreme Court's holdings in *California v. United States*, 438 U.S. 645 (1978). Because Supreme case law settles the preemption issue, California's legislative history argument does not require extensive discussion.

California draws heavily on the *California v. United States* opinion. In that case, the Supreme Court interpreted section 8 of the Reclamation Act of 1902, whose language is virtually identical to that in the FPA's section 27, to mean that the states may impose any condition on a water rights permit that is not inconsistent with congressional directives authorizing the reclamation project in question.[2] More specifically, the court held that the "section does, of course, provide for the protection of vested water rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use, or distribution of water.' . . . The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *California*, 438 U.S. at 675. This conclusion led the court to uphold WRCB permit conditions that required the United States to provide, among other things, a specific water use

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[2] Section 8, codified at 43 U.S.C. § 383 (1982), reads in relevant part, "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws. . . ."

plan before acquiring the water. In the course of its opinion, the court expressly disavowed what it deemed to be *dicta* in other cases that had restricted section 8's savings scope to proprietary laws alone. *California*, 438 U.S. at 672-75 (disapproving the interpretations of section 8 in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), and *City of Fresno v. California*, 372 U.S. 627 (1963)).

Since section 8 predates section 27, and apparently served as a drafting model for section 27, California argues that the *California* holding applies to section 27. This assertion leads California to conclude that its minimum flow requirements imposed on the Rock Creek project are therefore binding.

The difficulty California faces in making this argument is that other cases construing section 27, and its relation to section 8, have rejected California's reasoning. The leading case addressing section 27 is *First Iowa*, 328 U.S. 152. In *First Iowa*, the Supreme Court held that a provision of the FPA not at issue here, section 9(b), 16 U.S.C. § 802 (Supp. V. 1987), did not require the Commission to withhold a project license until the project's sponsors complied with requirements for state permits under Iowa law. In reaching this conclusion, the Court found cause to construe the FPA as a whole in order to determine Congress' intent on the question of preemption. The Court reasoned that the FPA expresses Congress' intent to concentrate comprehensive hydropower planning authority in the Commission. Allowing states to impose requirements that hobbled this planning power struck the Court as tolerating "a veto power . . . [that] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend on the judgment of the Federal Power Commission or other representatives of the Federal Government." *First Iowa*, 328 U.S. at 164 (footnote omitted). This interpretation of the FPA led the Court to disapprove the argument, among others, that the proposed project must conform to a state statute dealing with the permit terms and conditions the state may impose to protect fish life. *Id.* at 165-66.

In the course of construing the FPA as a whole, the Court offered an extensive commentary on section 27. The FPA, according to the Court, apportions authority over various aspects of

hydropower regulation between the federal government and the states. *Id.* at 167, 171. This division of power means not that the state and federal government shall have final decision making powers over the same issue, *id.* at 167-68, but rather that each entity shall have its own specific domain of control. Section 27, in the Court's reading of the FPA, describes the areas of control given to the states. The Court explicitly commented that the areas saved for state regulation are narrow in scope.

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. *It therefore has primary, if not exclusive, reference to such proprietary rights.* . . . There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

Id. at 175-76 (emphasis added). This reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in the section.[3]

California rejects *First Iowa* as controlling authority for three reasons. First, it claims that the Court's comments on section 27 constitute *dicta*. This argument is weak. As noted above, statutory construction entails looking at the statute as a totality, not in piecemeal fashion. Construing section 27 and other parts of the FPA was essential to the Court's preemption analysis of section 9(b). Dismissing *First Iowa*'s comments on section 27 as *Dicta* is improper.

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[3] We asked the parties to provide supplemental briefing on the issue of whether California's rights, if any, in Rock Creek's fish and fishery uses amounted to a proprietary right covered by section 27. Assuming, for purposes of argument only, that California has such rights, we conclude that they do not fall within *First Iowa's* narrow definition of the municipal and irrigation proprietary rights reserved for state control under section 27.

Second, California contends that *California v. United States* effectively overrules *First Iowa*'s interpretation of section 27, be it dicta or binding precedent. We find this argument unconvincing. The Supreme Court makes no reference to *First Iowa* in the *California* opinion. If the Court had intended to criticize or disapprove *First Iowa* it would have done so, just as it specifically disapproved the *dicta* of *Ivanhoe* and *City of Fresno*. A more reasonable interpretation of *First Iowa* and *California* is that they address two different and entirely separate water use programs. One federal court has held that the two cases do indeed address fundamentally different statutes. "In *California v. United States*, the Supreme Court dealt with a statute distinct in both purpose and history from that at issue in *First Iowa*. . . . Notwithstanding similarity in wording of the statutes, they serve different objectives, and relate to federal actions fundamentally dissimilar in nature." *Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134, 1154 (D. Vt. 1982), *aff'd* 722 F.2d 728 (2d Cir. 1983), *cert. denied*, 464 U.S. 942 (1983). We agree with this assessment. We conclude that *California*'s interpretation of the 1902 Reclamation Act does not affect *First Iowa*'s interpretation of the FPA. *First Iowa* continues to be cited by the Supreme Court and other federal courts as the authoritative interpretation of the FPA. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982); *Town of Springfield, Vermont v. Vermont Environmental Bd.*, 521 F. Supp. 243, 248-250 (D. Vt. 1981).

Finally, California argues that its flow requirements do not amount to a veto, in *First Iowa*'s use of the term, of the Rock Creek proposal. This argument is also unpersuasive. Changing the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license. In effect, this does not constitute a veto of the project that was approved and licensed by FERC.

IV. Legislative History

California devotes a considerable part of its brief to a review of section 27's legislative history in an attempt to show that Con-

gress intended the section to be a broad anti-preemption provision. The Supreme Court, however, considered the section's legislative history in *First Iowa* and concluded that it supported a preemption reading. *First Iowa*, 328 U.S. at 176 n.20. The Supreme Court's assessment of this legislative history is dispositive.

CONCLUSION

Our reading of the FPA combined with the Supreme Court's teachings in *First Iowa* convince us that Congress intended to vest regulatory authority in FERC over most aspects of hydropower projects. Only control over certain limited proprietary rights remains in state hands. The WRCB's state law powers to impose conditions on water use in this case conflict with congressional purposes and objectives expressed in the FPA. The WRCB must yield, consequently, to FERC in this matter. We affirm the Commission's decision and its denial of rehearing.

AFFIRMED.

APPENDIX 2

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Anthony G. Sousa, Charles G. Stalon,
Charles A. Trabandt and C. M. Naeve.

Rock Creek Limited Partnership
Project No. 3189-014

ORDER IN RESPONSE TO REQUEST FOR DECLARATORY ORDER AND PROVIDING FOR HEARING

[Issued March 11, 1987]

On April 29, 1983, the Director, Office of Electric Power Regulation, issued a license for the Rock Creek Project No. 3189, located on Rock Creek, in El Dorado County, California.[1] Article 37 of the license requires the licensee, Rock Creek Limited Partnership (Rock Creek),[2] to release interim minimum flows of 11 cubic feet per second (cfs) from May through September, and 15 cfs from October through April, or the inflow to the reservoir, whichever is less, in the by-passed reach of the project for the protection of fishery resources.[3] Article 38 of the license required Rock Creek, in consultation with the California Department of

[1] *See* 23 FERC ¶ 62,137 (1983).

[2] The license was originally issued to Joseph M. Keating. On September 10, 1985, the Director, Office of Hydropower Licensing, approved a transfer of the license from Mr. Keating to Rock Creek. *See* 32 FERC ¶ 62,566 (1985).

[3] 23 FERC at 63,204. Article 37 provides:

> Licensee shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule or the inflow to the reservoir, whichever is less: May through September—11 cubic feet per second (cfs) and October through April—15 cfs. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, for studies required by Article 38, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the California Department of Fish and Game.

Fish and Game (CDFG) and the U.S. Fish and Wildlife Service (FWS), to conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of fishery resources in the by-passed reach. This article also required Rock Creek, within one year from the issuance of the license, to file a report of its findings and, for Commission approval, its recommendations for a minimum flow release and other fishery protection and enhancement measures.[4]

The Director, Office of Hydropower Licensing (Director), subsequently granted Rock Creek two extensions of time to file the report required by Article 38 of the license. On October 4, 1985, nearly two and one-half years after the license was issued, Rock Creek filed its Article 38 study. It recommended therein that the interim minimum flows of Article 37 of the license be adopted as the permanent minimum flows for the project. On April 22, 1986, in response to a January 22, 1986 request from the Director, Rock Creek filed additional information regarding its report and recommendations.

On December 6, 1985, CDFG filed comments on Rock Creek's report and minimum flow recommendations. CDFG contended that the methodology used by Rock Creek to obtain its flow recommendations was flawed. CDFG recommended that Rock Creek be required to release on a permanent basis 30 cfs or

[4] *Id.* Article 38 provides:

> The Licensee shall, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of the fishery resources in Rock Creek between the dam and the powerhouse. Further, Licensee shall, within 1 year from the date of issuance of this license, file a report of its findings and, for Commission approval, recommendations for a minimum flow release and for other fishery protection and enhancement measures needed in Rock Creek between the dam and powerhouse. Agency letters of comment on the report and recommendations shall be included in this filing.

inflow, whichever is less, from October 1 to February 29, and 60 cfs or inflow, whichever is less, from March 1 to September 30. Rock Creek responded to CDFG's comments in a letter filed with the Commission on January 31, 1986.

Following the issuance of the license, Rock Creek obtained water right permits from the State of California for its project. These permits contained a provision specifying that Rock Creek was to release the same interim minimum flows as provided for in the license issued by the Commission. The permits also reserved to the California Water Resources Control Board (WRCB) the right to alter the interim minimum flows specified in the water right permits. On July 9, 1986, as supplemented September 5, 1986, Rock Creek, in response to the fact that WRCB had begun a proceeding to establish its own set of permanent minimum flows for the project, petitioned the Commission for a declaratory order confirming that the Commission has the exclusive jurisdiction to set minimum flows for the project, and that Rock Creek is to comply with the interim flow provisions of Article 37 of the license irrespective of any action taken by WRCB. Alternatively, Rock Creek requested that the Commission initiate a hearing to establish a permanent minimum flow for the project. With regard to this alternative request, Rock Creek asserted that: (1) Article 37 of the license confers on it a right to operate the project under the interim minimum flows for at least three to five years until sufficient experience has been acquired to set permanent flows; (2) the Commission did not reserve to itself in Articles 37 or 38 the authority to alter the interim flows without Rock Creek's consent; (3) the Commission can modify the interim flows only by following the procedures specified in Standard Article 15 of its license;[5] and (4) the interim flows are to be presumed adequate until otherwise demonstrated by the Commission.

[5] Standard Article 15 provides:

> The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the

On February 13, 1987, Rock Creek filed an emergency request for expedited action on its previous petition, indicating that on February 6, 1987, WRCB issued a draft order modifying the flows in the water right permits to the 30 and 60 cfs advocated by CDFG, and that WRCB was going to adopt the draft order at a WRCB meeting on either March 4 or 5, 1987. The draft order, which was attached to Rock Creek's request, states that WRCB has jurisdiction to determine minimum flows for the project and that the Commission-set flows are overridden unless they are stricter than those set by WRCB. On February 6 and 17, 1987, in response to a Director's December 10, 1986 additional information request, Rock Creek filed documents with the Commission wherein it alleged that the 30 and 60 cfs flows proposed for adoption in WRCB's order would render the project economically infeasible.

DISCUSSION

Minimum Flows at Licensed Projects Are Subject to the Commission's Exclusive Jurisdiction

As we explained recently in *South Fork Resources, Inc.*, 36 FERC ¶ 61,331 (1986), matters that are within the Commission's exclusive purview when licensing projects are not properly the subject of state regulation. The imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under Section 10(a) of the Federal Power Act (FPA).[6] As such, the establishment of minimum flows is a matter beyond the reach of state regulation. Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing, such as fishery protection and project economics, and would essentially

> Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after the notice and opportunity for hearing.

[6] 16 U.S.C. § 803(a). The FPA was amended by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495 (Oct. 16, 1986); however, the license for Project No. 3189 was issued prior to the enactment of ECPA.

vest a veto authority over projects in the states. As the U.S. Supreme Court explained in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 164 (1946), "[s]uch a veto power easily could destroy the effectiveness of the Federal Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgement of the Federal Power Commission." Consequently, WRCB has no authority to set minimum flows for the project that conflict with those contained in the license, and Rock Creek must comply with the flow requirements of Article 37 of its license until otherwise ordered by the Commission, irrespective of any action taken by WRCB. [7] [8]

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[7] The draft WRCB order suggests that control over the appropriation of water and hence minimum flow remains with the state pursuant to Section 27 of the EPA, 16 U.S.C. § 821. However, any authority provided to the states by Section 27 must yield when in conflict with the federal role in licensing. Furthermore, Section 27 has been held to only protect "proprietary" rights, *i.e.*, it only establishes a right of compensation for vested water rights taken by a Commission license. *See First Iowa*, 328 U.S. at 176, and *Portland General Electric Co. v. FPC*, 328 F.2d 1965 (9th Cir. 1964).

[8] ECPA reaffirmed the Commission's exclusive authority to establish minimum flows for licensed projects. On April 17, 1986, immediately prior to Senate passage of S. 426, the Senate version of ECPA, Senator Baucus inserted into the *Congressional Record* a position paper advocating the amendment of the FPA to vest in the states control over the appropriation, diversion, and use of water by licensed projects. In a colloquy with Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources, Senator Baucus agreed not to offer amendments to S. 426 to implement the recommendations of the position paper in exchange for Senator McClure's agreement to hold a hearing on the subject. *See* 99 CONG. REC. S4448-49 (April 17, 1986). A hearing was held by Senator McClure's committee on the subject on September 12, 1986. However, no amendments to ECPA regarding water rights were made either by the conferees during the conference held to reconcile the conflicting Senate and House versions of the legislation or by the House or Senate in adopting the Conference Report. Under Section 10(j) of the FPA, as added by ECPA, the Commission shall include conditions based upon recommendations

Commission's Authority To Modify Interim Flows

Rock Creek asserts that it has the right under its license to operate its project for three to five years to develop information necessary to establish a permanent minimum flow for the project. It contends that the license order's statement that the Article 38 study "would allow for a more detailed assessment of the impacts of the *project's operation* on fishery resources" (emphasis added)[9] means that the study has to continue after the project is operating and that the Commission cannot change the interim flows of Article 37 until a sufficient period of study has occurred.

Rock Creek's arguments are misplaced and ignore the actual wording of Article 38. That article provides that the study report has to be filed with the Commission within one year from the date of issuance of the license. The above reference to "project's operation" merely indicated that the anticipated effects of the project's operation had to considered as part of the Article 38 study. Thus, the license does not provide Rock Creek with the right to operate the project with the Article 37 interim flows for three to five years after the commencement of operation, and the Commission is not precluded from changing those flows at this time.[10]

Rock Creek also asserts that the Commission did not specifically reserve to itself in either Article 37 or 38 the right to modify

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submitted by state fish and wildlife agencies regarding pending license applications unless the Commission finds that adoption of such recommendations is inconsistent with the purposes and requirements of the FPA. As noted previously (n. 6, *supra*), the changes made by ECPA are not applicable to Project No. 3189, since the license for it was issued prior to the enactment of ECPA. Since Congress chose not to amend ECPA to vest control of water rights in the states after holding a hearing on the issue, Congress, in passing ECPA, confirmed the Commission's exclusive authority over water rights matters associated with licensed projects, including the authority to prescribe minimum flows for such projects.

[9] 23 FERC at 63,201.

[10] Rock Creek completed construction of the project and is operating it.

the Article 37 interim flows and, consequently, that the Commission can modify those flows only after following the notice and hearing provisions of Standard Article 15. However, once again, Rock Creek ignores the actual wording of Article 38.

Article 38 required Rock Creek to file within one year its fishery study and, "for Commission approval,"[11] its recommendations for a minimum flow release. Although we did not use the word "reserve", we believe that the "for Commission approval" language of the article clearly indicates that we would establish final flows for the project following the submittal of the fishery study and vested in us the authority to do so without resort to Standard Article 15 of the license. In any event, since, as explained next, we are setting this matter for hearing, we have met the procedural requirements of that article.[12]

Need For A Hearing

As discussed previously, Rock Creek recommends that the Article 37 interim flows be established as the permanent minimum flows for the project and that the higher 30 and 60 cfs flows recommended by CDFG would render the project economically infeasible. Our preliminary analysis of Rock Creek's contentions indicates that, based on the 50-year term of the license and taking into account investment tax credits and accelerated depreciation benefits, Project No. 3189 would be economically feasible over the 50-year term of the license with a levelized net annual benefit of approximately $26,000 if CFDG's recommended flows were adopted. However, our analysis also indicates that CDFG's recommended flows would cause Rock Creek to suffer an extended span of substantial financial loss during the license term: from

[11] *Id.*

[12] Rock Creek's contention that the interim flows are to be presumed adequate until otherwise demonstrated by the Commission also is misplaced. Although the Director concluded in the license order that, based upon then available information, the Article 37 minimum flows would not adversely affect the fishery resources of Rock Creek, no heightened level of proof is required to sustain new flows, so long as they are supported by substantial record evidence.

years 8 through 35, the project would operate at a loss. Such financial losses could jeopardize Rock Creek's ability to continue to operate the project.

Our preliminary analysis also indicates that flows in excess of the 11 and 15 cfs advocated by Rock Creek are necessary to protect and enhance the rainbow trout population and its habitat in the by-passed reach of the project. Our analysis also indicates that a schedule of higher flows ranging from 20 to 60 cfs can be established that would adequately protect and enhance the rainbow trout population but would not cause Rock Creek to suffer a net cumulative benefit loss in any year. Thus, it appears that minimum flows can be prescribed that would protect both the fishery resources and the financial viability of the project.

Given the importance of the fishery resources involved and the serious financial feasibility issues raised by this proceeding, and since it appears that there are material issues of fact in dispute,[13] we belive it would be appropriate to set the matter for hearing to more fully develop the record we will need to resolve the fishery resources/financial feasibility conflict. Accordingly, we are ordering the Chief Administrative Law Judge to designate a presiding Administrative Law Judge to conduct an expedited hearing on the issues set out below. As discussed *supra* at page 4, we have determined that we have exclusive jurisdiction with regard to the establishment of minimum flow requirements for this project and thus there is no need for it to be reexamined in the hearing. Consequently, the jurisdictional issue shall not be considered in the expedited hearing. Should they wish to have intervenor status, CDFG, WRCB, and the FWS shall notify the Commission within 30 days of the date of this order. Other entities may request participation in the hearing within 30 days from the date of this order, subject to Rules 214 and 504 (b)(12) of the Commission's rules of practice and procedure.

[13] *See* Cerro Wire and Cable v. FERC, 677 F.2d 1124, 1129 (D.C. Cir. 1982); General Motors Corp. v. FERC, 656 F.2d 791, at 798 n.20 (D.C. Cir. 1981).

The Commission orders:

(A) Rock Creek Limited Partnership shall release the flows specified in Article 37 of its license for Project No. 3189 until otherwise ordered by the Commission.

(B) A presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge, shall conduct an expedited hearing to consider the following factual issues in this proceeding:

(1) the minimum flows necessary to protect and enhance the rainbow trout population, including adult, spawning, and fry habitat, in the by-passed reach of Project No. 3189;

(2) the impact on project operations and financial and economic feasibility of the minimum flows recommended by any party to the proceeding; and

(3) alternative mitigation measures, if any, that could be imposed to reduce the amount of minimum flows necessary to protect and enhance the above-described fishery resources, and the impact on project operations and financial and economic feasibility of such alternative mitigation measures.

(C) The presiding Administrative Law Judge shall hold a prehearing conference in this proceeding no later than 45 days from the date of this order.

(D) Upon filing a notice for intervenor status, the California Department of Fish and Game, the California Water Resources Control Board and the U.S. Fish and Wildlife Service shall be made parties to the hearing as prescribed by Ordering paragraph (B).

By the Commission.

(SEAL)

/s/ KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary.

APPENDIX 3

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Martha O. Hesse, Chairman; Anthony G. Sousa,
Charles G. Stalon,
Charles A. Trabandt
and C. M. Naeve.

Rock Creek Limited Partnership
Project No. 3189-015

ORDER DENYING REHEARING
(Issued November 20, 1987)

On March 11, 1987, the Commission issued an order in response to a request for a declaratory order sought by Rock Creek Limited Partnership (Rock Creek).[1] Rock Creek, the licensee for the Rock Project No. 3189, located in El Dorado County, California, had requested a ruling that the Commission has exclusive jurisdiction to set minimum flows at the project and that the California Water Resources Control Board (WRCB) has no authority to prescribe flows for the project pursuant to authority reserved to itself in a water rights permit it had issued for the project. Citing to the Supreme Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (*First Iowa*), 328 U.S. 152 (1946), we held that the establishment of minimum flows for fishery protection or other purposes at licensed projects is a matter beyond the reach of state regulation and is within the Commission's exclusive jurisdiction. However, because additional information was needed in order to establish permanent minimum flows to replace the interim minimum flows required by the license,[2] we ordered a hearing before an administrative law

[1] 38 FERC ¶ 61,240 (1987).

[2] The license was issued on a April 29, 1983. *See* 23 FERC ¶ 62,137 (1983). The license established interim minimum flows of 11 and 15 cubic feet per secod (cfs) for the project and reserved to us the right to establish permanent minimum flows at a later date.

judge (ALJ) to determine the minimum flows necessary to protect and enhance the rainbow trout population in the bypassed reach of the project, the impact on project operations and the financal and economic feasibility of the project under alternative flows, and the feasibility of alternative mitigation measures.

On April 10, 1987, WRCB moved to intervene in the proceeding for the sole purpose of contesting our finding that it had no authority to prescribe minimum flows for the project. On the same date WRCB filed a request for rehearing of our March 11, 1987 order, asserting that we had acted capriciously and unlawfully in finding that we have exclusive jurisdiction to establish minimum flows and requesting that the Commission recognize WRCB's authority to establish minimum flows for projects even when they conflict with flows specified by the Commission. For the reasons set forth below, we are denying WRCB's request for rehearing.

Background

The pre-March 11, 1987 background of this proceeding is set out in our March 11, 1987 order[3] and need not be repeated here. On March 19, 1987, WRCB adopted a final order establishing minimum flows for the project that were the same as proposed in a draft order issued by WRCB prior to our March 11, 1987 order.[4] The hearing before the ALJ took place July 14 through 16, 1987. Initial and reply briefs were filed on September 1 and 22, 1987, respectively. The ALJ has not yet issued his initial decision in the proceeding.

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[3] *See* 38 FERC at 61,772.

[4] As explained in our March 11, 1987 order (*id.*), WRCB issued a draft order on February 6, 1987, establishing 30 and 60 cfs as minimum flows for the project. These conflicted with the 11 and 15 cfs flows required in the license. *See* note 2, *supra*.

Discussion

Party Status

Ordering Paragraph (D) of our March 11, 1987 order specified that WRCB could participate in the hearing by filing a notice of intervenor status within 30 days. Although we specified in our order that the jurisdictional issue regarding minimum flows would not be considered in the hearing, WRCB indicated in its April 10, 1987 motion to intervene that it was intervening for the sole purpose of contesting our jurisdictional ruling. On April 27, 1987, Rock Creek filed an answer to WRCB's motion to intervene, opposing the motion to the extent WRCB sought to make jurisdiction an issue in the hearing. In an unreported order issued April 28, 1987, the Chief ALJ, noting that we had conferred upon WRCB the right to intervene in the hearing in our March 11, 1987 order, granted WRCB's April 10, 1987 motion to intervene in the hearing.[5] [6] Since the hearing and our March 11, 1987 order establishing the hearing are components of the same "proceeding," WRCB's status as a party to the hearing gives it the standing to challenge our March 11, 1987 order. Consequently, we will entertain its timely request for rehearing of that order.

Jurisdiction

WRCB disputes our finding that we have exclusive jurisdiction to establish minimum flows for licensed projects. WRCB asserts that Section 27 of the Federal Power Act (FPA), 16 U.S.C.

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[5] ALJs, as presiding authorities, have the authority to act on motions to intervene. *See* 18 C.F.R. § 385.504(b)(12) (1987).

[6] The California Sportfishing Protection Alliance also moved to intervene "in the proceedings" on April 2, 1987, requesting that the jurisdictional issue specifically removed from the scope of the hearing by our March 11, 1987 order be addressed in the hearing. The Chief ALJ denied the Alliance's motion to intervene in his April 28, 1987 order. The Alliance subsequently requested leave to file an interlocutory appeal of the April 28, 1987 denial pursuant to 18 C.F.R. § 385.715 (1987). This was denied by the ALJ in an unreported order issued June 12, 1987.

§ 821,[7] provides the states with the authority to control licensees' appropriation of water and hence the minimum flows for their projects and that language to the contrary appearing in *First Iowa* was *dictum*. WRCB contends that this proposition is reinforced by the legislative history of the FPA and by the Supreme Court's interpretation in *California v. United States*, 438 U.S. 645 (1978), of a similar water rights provision contained in Section 8 of the Reclamation Act of 1902.[8]

In *First Iowa*, the Commission, relying on Section 9(b) of the FPA, 16 U.S.C. § 802(b),[9] had dismissed a license application for a project to be located in Iowa because the applicant had not presented evidence of its compliance with certain Iowa statutes, including one prohibiting the construction and operation of a dam or the taking of water from a stream without a permit from the state's Executive Council, one specifying that the method of construction, operation and maintenance of dams would be subject to the approval of the state's Executive Council, and one providing that a permit could be issued upon such terms and conditions as the state's Executive Council may prescribe but only if the water taken from a stream in connection with a project were to be returned thereto at the nearest practicable point without being materially diminished in quantity or polluted or rendered deleterious to fish life. The Commission was affirmed on appeal. *See* 151 F.2d 20 (D.C. Cir. 1945).

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[7] Section 27 of the FPA provides that

> nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

[8] 32 Stat. 390.

[9] Section 9(b) requires a license applicant to submit, in pertinent part,

> [s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes . . . .

In reversing the affirmance of the Commission's dismissal of the license application, the Supreme Court held that Section 9(b) of the FPA does not require applicant compliance with state laws such as those referenced above, since they would interefere with the responsibilities vested in the Commission by the FPA and thus are preempted by Part I of the FPA. The Court stated that interpreting Section 9(b) as requiring compliance with the state statutes in question would vest a veto authority in the states. It held that "[s]uch a veto power easily could destroy the effectiveness of the Federal [Power] Act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission." *First Iowa* at 164.

In reaching the above conclusion, the Court explained the interrelationship of the respective authorities of the United States and the states under the FPA as follows:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority. * * * A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.

First Iowa at 167-68.

Late in its opinion, the Court reiterated its explanation regarding the FPA's division of authority and explained the meaning of Section 27 of the FPA as follows:

Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of the constitutional rights of the States so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject [footnote omitted].

Sections 27 and 9 are especially significant in this regard. Section 27 expressly "saves" certain state laws relating to property rights as to the use of water, so that these are not superseded by the terms of the Federal Power Act. • • •

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The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to property rights. • • •

This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course [footnote omitted].

First Iowa at 174-76.

Thus, *First Iowa* clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a)[10] of the FPA are preempted. It also clearly stands for the proposition that the only

[10] Section 10(a) was redesignated Section 10(a)(1) by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495 (October 16, 1986); however, the license for Project No. 3189 was issued prior to the enactment of ECPA.

rights saved to the states by Section 27 of the FPA are property rights. In other words, the FPA does not abolish property rights in water secured under state law, and such rights cannot be taken by a Commission licensee without compensation.

As we explained in our previous order in this proceeding and in *Roseburg Resources Company and Mega Renewables* (*Roseburg*), 41 FERC ¶ 61,142 (1987), the imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process under Section 10(a). In considering and balancing all aspects of the public interest as we are required to by Section 10(a) in determining whether, and under what conditions, a license should issue,[11] we must balance, *inter alia*, the need to protect environmental interests with the need for the power to be produced by the projects. In so doing, we prescribe conditions, such as those relating to minimum flow releases, that we believe will provide the appropriate level of environmental protection and energy generation and will not issue a license if the conditions we deem necessary to protect environmental resources would render a project economically infeasible.[12]

Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by WRCB, would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could cause a project to become economically infeasible. Conversely, by imposing lower minimum

[11] *See* Udall v. FPC, 387 U.S. 428 (1987).

[12] *See* City of Broken Bow and Redark Development Authority, 38 FERC ¶ 61,237 (1987), and cases cited therein.

flows than prescribed in a license, a state could require the operation of a project providing less environmental protection than we found necessary in issuing the license. In other words, our role as the balancer of competing public interest considerations under Section 10(a) would be vitiated if the states possessed the authority asserted by WRCB.

We believe it is clear that the authority to impose minimum flow releases resides exclusively with us, since it is an integral part of our responsibilities under Section 10(a). Thus, any authority a state may have pursuant to state law to impose minimum flow releases is preempted by Section 10(a), even if in the exercise of that authority the state does not attempt to impose minimum flow conditions drastically different from those imposed in a license. This preemption is even clearer in cases where the minimum flow conditions the state is attempting to impose would render a project economically infeasible, since such conditions would result in the *de facto* veto of the project. We believe the only way to reconcile the provisions of Section 27 of the FPA with the comprehensive planning authority vested exclusively in us by Section 10(a) is to interpret Section 27 as only protecting property rights in water as was done in *First Iowa*.

WRCB attempts to deflect *First Iowa's* interpretation of Section 27 by labeling it *"dictum."* According to WRCB, the Section 27 language was *dictum* because the only issue before the Court was whether or not Section 9(b) required compliance with Iowa law and because the Iowa law was not a traditional water rights law in that it absolutely forbade construction of dams under certain circumstances rather than regulated water use under traditional "beneficial use" standards. Finally, WRCB contends that, since the issue before the Court was whether pre-licensing compliance with state law was required and not whether the states have authority to require licensees to obtain state water rights after a license is obtained, as WRCB contends is required by Section 27, Section 27 was not applicable in that case.

WRCB reads *First Iowa* much too narrowly. While we agree that the specific action before the Court was the Commission's dismissal of a license for the purported failure of the applicant to meet the requirements of Section 9(b), the Court could not have

made its Section 9(b) holding without having addressed the meaning of Section 27. Contrary to the characterizations of WRCB, the Iowa statutes at issue in *First Iowa* did relate to the regulation of water use. The statutes gave the state's Executive Council the authority to prescribe terms and conditions in a permit to ensure that the project would return water to a stream at the nearest practicable place to where it was taken without being, *inter alia*, rendered deleterious to fish life. Also, the statutues gave the state's Executive Council the authority to approve, *inter alia*, the operation of any dam, which would presumably cover the means and timing of water use by the dam and related facilities. Thus, the statutes clearly related to the regulation of water use and provided Iowa's Executive Council with authority comparable to that which WRCB contends it can exercise in this case.

The Iowa statutes at issue in *First Iowa* related to the appropriation, diversion, and use of water as referenced in both Sections 9(b) and 27 of the FPA. In reaching its conclusion that Section 9(b) did not require compliance with the Iowa statutes at issue, the Court had to construe Section 27 as only saving state laws relating to property rights in water. In other words, if the Court had interpreted Section 27 as does WRCB, it could not have made its Section 9(b) determination, since the laws saved under such an interpretation of Section 27 would be equivalent to the ones the Court found the license applicant did not have to demonstrate compliance with under Section 9(b). Thus, the Court's discussion of the reach of Section 27 was necessarily interwined with its Section 9(b) conclusion and therefore cannot be considered *dictum*.

Finally, WRCB's attempt to distinguish the Court's Section 27 discussion on the basis of pre- versus post-licensing application is unpersuasive. Although the specific action appealed in *First Iowa* was the Commission's dismissal of a license application for failure to demonstrate compliance with Iowa statutes, the Court made clear that compliance with the statutes was not required at any point in time.[13]

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[13] *See, e.g.*, the Court's statement (328 U.S. at 166) that "[i]f a state permit is not required, there is no justification for requiring the peti-

Although we believe that the *First Iowa* Court's discussion of Section 27 was not *dictum* and hence controls the present case, we note that in *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), the Court, in response to the Commission's contention that sums paid by a licensee for the right to use water for power purposes were not to be included in calculating the licensee's amortization reserve liability under Section 10(d) of the FPA, 16 U.S.C. § 803(d), because pre-existing water rights were abolished by the FPA, held that such rights survive until taken over by purchase or otherwise and stated that *First Iowa's* language regarding Section 27 was applicable to proprietary water rights for power purposes as well as those for other proprietary uses.[14] Thus, the Court itself has followed its interpretation in *First Iowa* that Section 27 is intended to protect property rights in water acquired pursuant to state law.

The United States Circuit Courts of Appeals have also interpreted the FPA as not requiring compliance with state water use or regulation statutes. In *State of Washington, Department of Game v. Federal Power Commission*, 207 F.2d 391, 396 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954), the court, relying on *First Iowa*, and without reference to Section 27, held that a license applicant did not have to show compliance with the laws of the State of Washington, including a statute requiring it to obtain a permit for the diversion of water, prior to obtaining a Commission license, and that state laws cannot prevent the Commission from issuing a license or bar a licensee from acting under its license to build a dam on a navigable stream. In *Portland General Electric Co. v. Federal Power Commission*, 328 F.2d 165 (9th Cir. 1964), the court stated that the "only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise by another, of a license

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tioner, as a condition of securing its federal permit, to present evidence of the petitioner's compliance with the requirements of the State Code for a state permit."

[14] *See* 347 U.S. at 256. *See also* Ford & Son v. Little Falls Co., 280 U.S. 369 (1930).

granted by the Commission,"[15] and held that Section 27 did not stand in the way of the Commission imposing navigation conditions in a license that could interfere with the licensee's retention and exercise of its state-granted water rights.[16] In *State of California v. Federal Power Commission*, 345 F.2d 917, 923 (9th Cir. 1965), the court applied the Section 27 rationale of the previously-cited case to conclude that the Commission had authority to impose conditions under Section 10(a) of the FPA which could impair a licensee's full use of irrigation water rights in future years. Finally, in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 478 (2nd Cir. 1971), *cert. denied*, 407 U.S. 926 (1972), the court held that Section 27 was not intended to give entities the power to veto Commission action. Thus, the circuit courts either implicitly or explicitly have given Section 27 the same interpretation as afforded it by the Supreme Court.

WRCB's contention that the legislative history of the FPA supports its interpretation of Section 27 is unpersuasive. First, the Court in *First Iowa* specifically considered the portion of the Congressional *Record* where the statements referenced by WRCB appear and found that the legislative debate "further emphasized the purely proprietary sense in which this language was used."[17] Second, we believe the statements quoted by WRCB merely support the interpretation given to Section 27 by the Court in *First Iowa*, that the right to divert and use water resides in the states and that, if a Commission licensee takes such a right, it must compensate the owners of the right. In other words, a license does not abrogate those rights; rather, the license effectuates the "admittedly superior right of the Federal Government . . . to regulate interstate and foreign commerce,"[18] so long as compensation is made for water rights taken.

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[15] 328 F.2d at 176.

[16] 328 F.2d at 177.

[17] *First Iowa* note 20 at 176-77.

[18] *First Iowa* at 171.

WRCB's contention that the Court's decision in *California* supports its position is also unpersuasive. The Court held in that case that, because of Section 8 of the Reclamation Act of 1902,[19] the Bureau of Reclamation would have to appropriate, purchase, or condemn water rights necessary for its water project in conformity with state law and that state conditions on these water rights were valid so long as they were not inconsistent with Congressional directives concerning the dam. Although the Court in *First Iowa*, some of the legislative history cited to by WRCB, and two of the circuit court decisions referenced previously[20] indicated that Section 27 of the FPA was based in part on Section 8 of the Reclamation Act of 1902, the Court's decision in *California* regarding the effect of Section 8 does not lead to the conclusion that states have the right to prescribe minimum flow or other conditions on licenses under Section 27 of the FPA.

The Reclamation Act of 1902 does not vest comprehensive planning responsibilities in the Bureau of Reclamation; rather, the Bureau of Reclamation is charged with the responsibility of developing reclamation projects pursuant to specific Congressional directives relative to each project. Thus, the Court in *California* did not have to address a potential conflict between state requirements and project conditions developed through an agency comprehensive planning process mandated by statute. In contrast, and as we explain herein and in *Roseburg*, Part I of the FPA gives the Commission a comprehensive planning role with respect to hydro-electric development on Commerce Clause waters. Consequently, state requirements with respect to minimum flow and other provisions which deal with subjects falling within the Commission's comprehensive planning under Part I of the

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[19] Section 8 of the Reclamation Act of 1902 provides, in pertinent part, that

> nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

[20] *Portland General Electric* and *Scenic Hudson*, *supra*.

FPA clearly conflict with the Congressional directive of the FPA that we exercise these comprehensive planning responsibilities. Thus, such requirements are preempted by Part I of the FPA. Consequently, interpreting Section 27 of the FPA as not granting WRCB the authority to prescribe minimum flows for Project No. 3189 is consistent with the Court's opinion in *California*. Also, as discussed in *Roseburg*, the continued vitality of *First Iowa* was recently adverted to by the Court in *Pacific Gas & Electric Co. v. Energy Resources Commission (PG&E)*, 461 U.S. 190, 223 note 34 (1983).[21]

Finally, and as indicated previously,[22] the license for Project No. 3189 was issued prior to the enactment of ECPA; therefore, the changes made to the FPA by ECPA are not applicable to Project No. 3189. However, we believe that two of the amendments made to the FPA by ECPA reinforce our interpretation of Section 27 as not vesting in the states the authority to set minimum flow releases for licensed projects.

First, Section 3(a) of ECPA amended Section 4(e) of the FPA to make explicit that in issuing licenses we are to give "equal consideration" to the purposes of energy conservation, the protection, mitigation, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality in addition to the power and development purposes for which licenses are issued. If the states were permitted to specify the minimum flow releases for projects under WRCB's interpretation of Section 27, we would be unable to carry out our obligation to give equal consideration to all of the values set out in amended Section 4(e), since the states, by having the ability to impose conditions different from those

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[21] WRCB acknowledges the existence of *PG&E* but dismisses it as providing "little illumination concerning the issues arising here." WRCB petition at 24, note 3. While WRCB correctly points out that Section 27 was not an issue in *PG&E*, the Court clearly underscored the decisional significance of the Commission's comprehensive planning responsibilities under the FPA in the preemption context.

[22] *See* note 10, *supra*.

included in licenses, could negate the set of conditions imposed by us to effectuate our equal consideration of these values.

Second, Section 3(c) of ECPA added a new subsection (j) to Section 10 of the FPA requiring us to include license conditions based on the recommendations of federal and state fish and wildlife agencies for the protection, mitigation, and enhancement of fish and wildlife. However, although Section 10(j) requires the Commission to give due weight to the expertise of such agencies, Section 10(j) does not vest a veto authority over licenses in such agencies, and the ultimate authority to decide if, and under what conditions, a license should issue resides with the Commission under Sections 4(e) and 10(a)(1) of the FPA.[23] We believe that it would be incongruous to argue that, although a state fish and wildlife agency has no authority to prescribe mandatory conditions in licenses for fish and wildlife through Section 10(j), a state water resources agency such as WRCB has the authority to impose minimum flow release requirements for fishery purposes such as those involved in this case under the guise of water rights law pursuant to Section 27 of the FPA.

The Commission orders:

The request for rehearing filed on April 10, 1987, by the California Water Resources Control Board is denied.

By the Commission.

(SEAL)

/s/ LOIS D. CASHELL

Lois D. Cashell,
Acting Secretary.

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[23] *See* H.R. REP. NO. 99-934, 99th Cong., 2nd Sess. at 23-24 (1986).